Petition

81-1402

FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

January Term 1982

THOMAS JAMES O'GRADY
and
ESTATE OF
VALENTINE MICHAEL O'GRADY (Deceased)
Petitioners,

vs.

JAMES G. WATT, et al
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

THOMAS JAMES O'GRADY
2105 Brickell Ave.
Miami, Florida 33129

The Petitioners, Thomas James O'Grady and Valentine Michael O'Grady (deceased), respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in Case Number 80-01782 on October 6, 1981.

I

QUESTIONS PRESENTED

(a) Whether the Mineral Leasing Act, 30 U.S.C. 188(c) and the regulations thereunder preclude the Petitioners from proving "substantial hardship" or a label of "reasonable diligence," in failing to renew an oil and gas annual rental fee, due to the double homicide of leasee (Valentine M. O'Grady, deceased) and his wife (Lillian Mary Quinlan O'Grady)?

(b) Did the District Court and the Court of Appeals fail to adequately review the administrative action of the respondents?

(c) Is the legislative history and the congressional mandate of 30 U.S.C. 188(c) unconstitutional and a burden on interstate commerce?

(d) Does Petitioner's complaint state a cause of action sufficiently warranting judicial review under the Administrative Procedure Act and 42 USC. 1981-1983 *et. seq.* to allow review by this court?

(e) Are the regulations and 30 U.S.C. 188(c) stand up to strict scrutiny or are they overly burdensome, oppressive or arbitrary and capricious as applied to petitioners?

(f) Is there an implied in law contract to accept late rental payment if leasees are planning drilling operations and the lease has a primary term of ten years, with a right of renewal if a producing well is discovered?

(g) Are Respondents guilty of fraud in accepting primary term payments and then denying drilling rights, i.e., does the general practice in the industry in California and Arizona differ as to the length of the primary term, i.e., ten years, and the length of time the lessee may hold the lease by payment of the relatively inexpensive delay rental?

(h) Are Petitioners denied due process and equal protection of the laws because differing standards in the on-shore and outer continental shelf drilling programs?

II

PARTIES

All parties to the proceeding are the same as in the court below.

III

TABLE OF CONTENTS

	Page
Questions Presented	ii
Parties	iv
Table of Contents	v
Table of Authorities	vi
Opinions Below	1
Grounds for Jurisdiction	1
Constitutional Provisions, Statutes and Regulations Involved	1
Statement of the Case	1-2
Argument and Reasons for Granting the Writ	2-5
Conclusion	6

TABLE OF AUTHORITIES

Cases	Page
Genevieve C. Aabye, 33 IBLA 285	3
Elwyn C. Hale, Lease #06310	3
David Kirkland, 19 IBLA 305	3
EPA v. National Crushed Stone, 66 L.Ed.2d 268 (Sup. Ct. 1981)	4
Fuel Resources Devel. Co., 43 IBLA19	3
Lone Star Producing Co., 28 IBLA 132	3
Long v. U.S., 652 F.2d 625	4
Ram Jet. Inc. v. Andrus, 428 F.Supp. 1165	3-6
Santor v. Morton, 383 F.Supp. 1265	3
State of Calif. v. Watt	2

TABLE OF AUTHORITIES (Continued)

Cases	Page
U.S. v. Correll, 389 U.S. 307	4
Billy Wright, 29 IBLA 81	3

IV

OPINIONS BELOW

THERE WAS NO OPINION BELOW.
(SEE APPENDIX ONE FOR ORDER.)

V

GROUNDS FOR JURISDICTION

Federal Question Jurisdiction Exists, 28 USC 1331, 5 U.S.C 701-706 *et. seq.*; 42 U.S.C. 1981-83 *et seq.*; 28 U.S.C. 2201-2202 and any Constitutional Infirmities can be reviewed by this court pursuant to 28 U.S.C. 1343, 2201, 2202 and the commerce clause of the U.S. Constitution and the Drilling Industry as regulated by 28 U.S.C. 1332, the Interstate Commerce Act.

VI

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The 5th Amendment, the 14th Amendment, the Commerce Clause; Article IV, Section 3, Clause 2 of the Constitution and the Mineral Leasing Act of 1920, 30 U.S.C. 188(c).

VII

STATEMENT OF THE CASE

Petitioner and his wife were killed September 19, 1978. Petitioner owned two oil and gas leases issued by

the Bureau of Land Management (BLM) of the Department of the Interior. The La Salle National Bank of Chicago, as executor of decedents estates, failed to timely file the lease rental payments due on lease numbers CA-2789 and A-8033. Petitioners sought judicial review, declaratory and injunctive relief from the trial court. Petitioners motion to dismiss was granted March 31, 1981 (see Appendix Two). The Circuit Court affirmed pursuant to a motion for summary affirmance.

VIII

ARGUMENT AND REASONS FOR GRANTING THE WRIT

In *State of California v. Watt*, No. 80-1894 (D.C. Cir 1981) the circuit court granted the relief requested in reviewing the constitutionality of 43 U.S.C. 1337(4)(a), 1343, 1344(d)(2), 1345, 1351(a)(f)(g), and 1352(d).

Section 18 of the 1978 amendments to the Outer Continental Shelf Lands Act (43 U.S.C. 1344(a)) requires the secretary of the interior to prepare, maintain and periodically revise a leasing program consisting of a schedule of proposed sales, indicating, "as precisely as possible, the size, timing and location of leasing activity which he determines will best meet national energy needs" . . .

Any such program, congressional mandate or legislative intent directly violates Petitioners constitutional rights to equal protection and due process of law.

In fact, the 1978 amendments to the Outer Continental Lands Act demand that this court strictly scrutinize the congressional intent of 30 U.S.C. 188(c). See also, *Ram Jet Inc. v. Andrus*, 478 F.Supp. 1165 (9th Cir 1980); *Santor v. Morton*, 383 F.Supp. 1265 (D.C. Wyo. 1974); *Billy Wright*, 29 IBLA 81 (1977); *David Kirkland*, 19 IBLA 305 (1975); *Genevieve C. Aabye*, 33 IBLA 285 (1978); *Fuel Resources Devel. Co.*, 43 IBLA 19, 21-22 (1979).

In IBLA 77-551 and 77-553, Ram Petroleums, Inc. and Ramoco, Inc. decided October 11, 1978, Administrative Law Judge Joseph W. Goss, dissented on the basis of Lone Star Producing Co. 28 IBLA 132, 144-46 (1976) and Elwyn C. Hale, Oil and Gas Lease Las Cruces 06310, Private Law 90-294, reprinted as an appendix to S. Rep. No. 91-205, 91st Congress, 1st Sess. (1969), Serial Set 12834-1.

In *Ram Pet. Inc. v. Andrus*, 478 F.Supp. at 1169 District Judge Thompson stated, "If anything, Ram's position is stronger than Mr. Hale's ... [because] the employee was expressly asked if she had made ... the payments."

In the case at bar Respondents have fraudulently endeavored "to cover up" the real facts vis-a-vis Watergate—with the unwitting help of the LaSalle National Bank and the law firm of Bradley, Bradley and Nedderman in Chicago, Illinois, attorneys for decedents estate.

Further Respondents are hiding behind "Iron Curtain tactics" on the basis of H.R. Rep. No. 91-1005, 91st

Cong. 2d. Sess. *Reprinted in* [1970] U.S. Code Cong. & Ad. News 3002, 3005 which legislatively dictates that payments be made within the 20 day reinstatement period.

The central issue for this court in granting any writ is whether the Secretary of the Interior overstepped his rule making authority in implementing a Congressional mandate or whether procedurally the Subject Act [MLA] and regulations as implemented, denied Petitioners due process or equal protection of the laws.[1]

In *Long v. United States* the Sixth Circuit succinctly stated the general rules regarding the drafting of technical regulations. The draftsman of relations is necessarily forged to consider the need for blanket rules which can be easily applied. . . . As such, it may indeed be impossible to draft regulations which, when applied, will in every instance further "the legislative purpose." This is especially so in "this area of limitless factual variations." *United States v. Correll*, 389 U.S. at 307, 88 S.Ct. at 450.[2]

Obviously, the District Court, the Respondents and the Court of Appeals, in the case at bar, know little if anything about oil drilling operations. The leasee's intent, notwithstanding, the subject wells of Petitioner's have a life expectancy of 10-20 years.

---

[1]See, *E.P.A. v. National Crushed Stone*, 66 L.E.D. 2d 268 (Sup. Ct. 1981).

[2]See *Long v. U.S.*, 652 F.2d. at 681.

If two 10-20 year wells "come in or hit it" black gold would flow for the leasee as well as the leasor.

A condition precedent to auctioned leases is that oil drilling is an ultra hazardous activity and reasonable diligence supersedes "undue hardship" unless God, King and Country rule that a leasee cannot exercise his contractual rights to drill. Respondents have chopped off Petitioner's substantive, procedural, contractual, constitutional and, implied in law contractual rights to reasonableness and fair play because Petitioner was untimely and paradoxically killed during plans to initiate drilling preparations.

IX

CONCLUSION

This court can no longer philosophically ride Casandra's Horse into the realm of Don Quixote if this country is going to survive the present energy crisis.

The Brother Petition filed in Ramoco Inc. and *Ram Pet. Inc. vs Watt et al* October term, 1981, in this same court is hereby adopted in full.

However, the facts of the instant case dictate that under prior IBLA decisions a double homicide is catatrosphic enough to decedent's family, without hiding behind euphoric melodies and swan songs sung by an inept congress who know little, if anything, about drilling practices either off-shore or on-shore.

Justice demands graveside eulogies are no contest even for inadequate administrative relief and bureaucratic "hard-core litigation tactics" by the Department of Justice and Secretary of the Interior.

The subject writ should be issued forthwith and a full trial held on the merits or leasee's leases should be reinstated.

Appendix

APPENDIX I

[FILED OCT 6 1981]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981
Civil Action No. 80-01782
No. 81-1423

Thomas James O'Grady,

Appellant

v.

James G. Watt,
Secretary of the Interior, et al.

ORDER

On consideration of appellant's motion pursuant to local rule to file pleadings from related cases in the ninth and the tenth circuit courts of appeal, it is

ORDERED that the aforesaid motion is dismissed as moot.

FOR THE COURT:
GEORGE A. FISHER, Clerk
BY: Robert A. Bonner
Chief Deputy Clerk

[FILED OCT 6 1981]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981
Civil Action No. 80-01782
No. 81-1423

Thomas James O'Grady,

Appellant

v.

James G. Watt,
Secretary of the Interior, et al.

BEFORE: Wald, Mika and Edwards, Circuit Judges

ORDER

On consideration of appellees' motion for summary affirmance and of the response thereto, it is

ORDERED by the Court that appellees' motion is granted and the order on appeal herein is summarily affirmed for the reasons set forth by the District Court.

Per Curiam

Circuit Judge Mikva did not participate in the foregoing order.

APPENDIX 2

[FILED MAR 31 1981]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1782

THOMAS JAMES O'GRADY, et al.,
Plaintiffs

v

CECIL ANDRUS, et al.,
Defendants

MEMORANDUM

Plaintiffs, Thomas James O'Grady and the estate of his father, Valentine Michael O'Grady, bring this action against the Secretary and the Department of the Interior and the Bureau of Land Management (BLM). They seek damages and injunctive relief vacating a Notice of Termination of an oil and gas lease[1] held by the father, and they also seek to enjoin any re-leasing of the subject lands. They further seek a declaration that defendants' actions were arbitrary and capricious, that they were in violation of various federal antitrust and securities laws, and that they violated the due process and equal protection clauses. Finally, they ask

[1]Plaintiffs also request reinstatement of a second lease. However, defendants have no record of that lease, and plaintiffs have profferred no evidence of its existence.

the Court to find that Section 188(c) of the Mineral Leasing Act (the Act), 30 U.S.C. §188(c) (1976), and 43 C.F.R. §310.82-1 (1979) are unconstitutional. The matter is before the Court on defendants' motion to dismiss.

Valentine O'Grady was issued the lease in dispute on April 28, 1975, effective May 1, 1975. Under the Act the rental payment is due on or before the anniversary date of the lease, in this case May 1. 30 U.S.C. §188(b) (1976). The father and his wife died on September 18, 1978 — 7½ months before the lease payment was due. The payment on or before May 1, 1979 was not received until July 3, 1979, nine weeks after it was required to be paid. The payment was made by the LaSalle National Bank of Chicago, Illinois, the administrator of the father's estate. On July 20, 1979, a Notice of Termination was issued, citing as the reason the lessee's failure to pay the rental in a timely manner. The Notice also indicated that there was no showing of due diligence. An appeal was denied on April 21, 1980, and a petition for reconsideration was denied on May 29, 1980. Both decisions relied upon the statute's language that reinstatement of an automatically terminated lease was possible only if the rental fee was paid on or within 20 days of the anniversary date of the lease. Plaintiffs then commenced this action.

The portions of the Act pertinent here are as follows:

> [U]pon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the

> lease shall automatically terminate by operation of law . . .
>
> 30 U.S.C. §188(b).

> Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease . . .
>
> 30 U.S.C. §188(c)

The applicable regulations are to the same effect. *See* 43 C.F.R. §3108.2-1 (1979).

It is evident that the language in the statute is in the conjuctive. Defendants had no authority to reinstate the lease since the payment was more than twenty days late. Plaintiffs contend that 43 C.F.R. §3108.2-1(c)(4) gave the Secretary discretion to reinstate. The only possible reading of that regulation, however, is that the Secretary had such discretion *if* payment was made within twenty days of the due date. Congress recognized that the twenty-day limitation would cause hardship, but nevertheless enacted it. H.R. Rep. No. 91-2005, 91st Cong., 2d Sess., *reprinted in* [1970] *U.S. Code Cong. & Ad. News*, 3002, 3005. This Court cannot repeal the limitation. Defendants' actions taken pursuant to the Act were not arbitrary or capricious, and plaintiffs

have cited no authority which would justify a finding that these statutorily-mandated actions constituted a deprivation of either due process or equal protection.

Plaintiffs' contentions that defendants' actions also violate other federal laws are likewise without merit. The antitrust laws have never been interpreted as a restraint upon government action. *Alabama Power Co. v. Alabama Electric Coop., Inc.*, 394 F.2d 672, (5th Cir. 1968). Assuming that a lease of this type is a security, the federal government is expressly exempted from the securities laws cited. 15 U.S.C. §§77c(a)(2), 78c(c) (1976).

Plaintiffs' other constitutional objections are without substance. The statute and regulations in question are in no way vague. Plaintiffs also contend, apparently, that they have been discriminated against because of the different lease termination policies and allowable discretion found in the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-43. The two regulatory provisions cited deal with suspensions of operations or production, which is not the case here. As to any differences in discretionary authority, plaintiffs have not shown what those differences are, and they have not shown how they were discriminated against. Consequently, they have failed to state any valid claims, and the case is dismissed. An appropriate order follows.

/s/ Jno Lewis Smith, Jr.
United States District Judge

[FILED MAR 31, 1981]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1782

THOMAS JAMES O'GRADY, et al.,
Plaintiffs

v

CECIL ANDRUS, et al.,
Defendants

ORDER

Upon consideration of defendants' motion to dismiss, the opposition of plaintiffs, memoranda submitted by the parties, the arguments of plaintiff and counsel, and the entire record, it is by the Court this 31st day of March 1981

ORDERED that defendants' motion is granted and the case is dismissed.

/s/ Jno Lewis Smith, Jr.
United States District Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

RAM PETROLEUMS, INC., & RAMOCO, INC.

IBLA 77-551 and 77-553

Decided October 11, 1978

APPEARANCES: James W. McDade, Esq., of McDade and Lee, Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Ram Petroleums, Inc., and Ramoco, Inc., have appealed from separate decisions of the Nevada State Office (BLM) dated August 8, 1977 (N-12775 *et al.*), and of the Utah State Office (BLM) dated August 16, 1978 (U-32798 *et al.*). These decisions denied petitions for reinstatement of 30 oil and gas leases which had terminated by operation of law when payments of the annual rentals were not received on or before the anniversary dates of the leases.[1]

For all the Nevada leases the anniversary date was July 1, 1977, and the rental payments were not mailed from Toronto, Ontario, Canada, until June 30, 1977, and received by the BLM Nevada office on July 6, 1977. For all the Utah leases the anniversary date was also July 1, 1977. The rental payment for lease U-33482 was postmarked afternoon on June 30, 1977, at Tor-

---

[1] The leases involved in these appeals are:
Ram Petroleums, Inc.: N-12775, N-12776, N-12777, N-12778, N-12780, N-12781, N-12782, N-12783, N-12784, N-12785, N-12786, N-12787, N-12788, N-12789, N-12790, N-12791, N-12792, N-12793, N-12871.
Ramoco, Inc.: U-32798, U-32936, U-33473, U-33474, U-33475, U-33476, U-33477, U-33481, U-33482, U-33483, U-33485.

onto, Ontario, Canada, and not received until well after the due date. The rental payments for the remainder of the Utah leases were not postmarked until after the anniversary date and not received until July 19, 1977.

Appellants petitioned the BLM for reinstatement of these leases contending the payments were filed late due to circumstances beyond their control, *i.e.*, the sudden failure of an employee to perform her duties to mail timely the rentals, coupled with her subsequent false assurances to a corporate executive that the duties had been performed and the rentals had been timely mailed. The State Offices did not find either that appellant had exercised reasonable diligence or that the failure to pay timely was justifiable, so as to qualify the leases for reinstatement.

[1] An oil and gas lease terminated for failure to pay annual rental on or before the anniversary date may be reinstated only if the failure to pay timely was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1970). Reasonable diligence requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 C.F.R. 3108.2-1(c)(2). We note that for part of the leases at hand mailing a rental payment 1 day before its due date does not constitute reasonable diligence. *David R. and Darla L. Smith*, 33 IBLA 63 (1977); *Edward Malz*, 33 IBLA 22 (1977); *Adolph Muratori*, 31 IBLA 39 (1977); *Nevada Western Oil Co.*, 30 IBLA 379 (1977); *Louis Samuel*, 8 IBLA 268 (1972), *aff'd*, *Samuel v. Morton*, Civ. No. CV-74-112-EC (August 12, 1974), *aff'd*, *Maisano v. Morton*, Civ. No. 39720 (E.D. Mich., October 12, 1973). Nor for the remaining leases does mailing the payment after it is due constitute reasonable diligence. *Apostolos Paliombeis*, 30 IBLA 153 (1977); *Bobbie Arnold*, 24 IBLA 352 (1976). Thus, appellants cannot show that failure to make timely payment was not due to a lack of reasonable diligence

on their part. We then turn to whether appellants have demonstrated justifiable delay.

[2] Failure to pay rental timely is justifiable only when it is caused by factors outside the lessee's control, which were the proximate cause of the failure. *Adolph F. Muratori, supra; Constitution Petroleum Co., Inc.*, 25 IBLA 319 (1976). Appellants expound at length on appeal as to the extenuating circumstances which they assert justify reinstatement. A particular employee who was responsible for mailing rental checks on their leases in this area and who had satisfactorily performed the required procedures in the past, in this instance failed, for whatever reason, to take the required measures to send in the rental payments in good time. The employee's supervisor specifically inquired whether the payments had been made and she responded they had been paid, when in fact they had not. Later, a similar inquiry by the corporations' president evoked the same untrue response. Appellants allege that this inquiry was made of the employee sufficiently in advance of the rental due dates so that timely payment could still have been made if the employee had responded truthfully that she had not performed her duties. Appellants point out that they have no control over the veracity of their employees. Appellants argue, in essence, that they had done all they could under the circumstances to comply with the regulations, and that they had acted in a way that satisfies one or both of the criteria for reinstatement.

We find no merit in this argument. Although appellants claim they did all they could to assure timely payment, we do not find that their reliance on the employee's statement is sufficient action to classify the subsequent failure to pay as justifiable. Appellants hired and supervised this employee and established the company procedures by which rental payments were to be made. It is axiomatic that appellants bear the responsibility and the consequences for the action or inaction of their employees. They could easily have gone one step fur-

ther and actually verified if rental payments had been sent rather than merely accepting the assurances of this employee. A simple checking of the account records to substantiate that the payments were made would have been a more prudent course of action. We find no basis to stray from our earlier rulings that the inadvertence or negligence of a lessee's employee does not justify reinstatement of a lease terminated for failure to make a timely rental payment. *Shell Oil Company*, 30 IBLA 290 (1977); *Phillips Petroleum Company*, 29 IBLA 114 (1977); *Samuel J. Testagrossa*, 25 IBLA 64 (1976); *Monturah Co.*, 10 IBLA 347 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the decisions of the State Offices are affirmed.

EDWARD W. STUEBING
Administrative Judge

I concur:

DOUGLAS E. HENRIQUES
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

While a corporation is ordinarily responsible for the acts of its employees, appellant has alleged that (1) a supervising attorney, (2) the president of the corporation, and (3) Robert Opekar all checked to determine whether the rentals had been paid. Each of these inquiries would have disclosed the facts in time for timely payments, if the employee had not lied. I feel that reasonable diligence has been shown under *Elwyn C. Hale,* Las Cruces 06310 (August 27, 1968). That case, which involved a secretarial error, was a basis for enactment of 30 U.S.C. § 188(c). *Lone Star Producing Company,* 28 IBLA 132, 144-46 (1976) (dissent). The payments here were made well within the 20-day period for reinstatement. I would reinstate the leases.

JOSEPH W. GOSS
Administrative Judge

CERTIFICATE OF MAILING

I, Thomas J. O'Brady, hereby certify that two copies were mailed January 4, 1982 to the U.S. Department of Justice, Land and Natural Resources Div., Main Justice Building, Washington, D.C.

THOMAS J. O'BRADY

4 Jan. 1982

Opposition

Office - Supreme Court, U.S.
FILED
FEB 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1402

In the Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS JAMES O'GRADY, ET AL., PETITIONERS

v.

JAMES G. WATT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

KATHRYN A. OBERLY
ARTHUR E. GOWRAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior's refusal to reinstate oil and gas leases, when precluded from doing so by clear statutory provision, violated petitioners' Fourteenth Amendment rights to equal protection and due process.

2. Whether the Secretary's refusal exceeded his statutory authority or was otherwise arbitrary or capricious.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 3

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Ram Petroleums, Inc. v. *Andrus*, 478 F. Supp. 1165, rev'd, 658 F. 2d 1349 7

Ramoco, Inc. v. *Andrus*, 649 F. 2d 814, cert. denied, No. 81-381 (Nov. 9, 1981) 7

Santor v. *Morton*, 383 F. Supp. 1265 7

Constitution, statutes and regulation:

United States Constitution, Fourteenth Amendment 5

Mineral Lands Leasing Act, 30 U.S.C. (& Supp. III) 181 *et seq.* 3

Section 31, 30 U.S.C. 188 5

Section 31(b), 30 U.S.C. 188(b) 2, 3, 6

Section 31(c), 30 U.S.C. 188(c) 2, 3, 4, 6, 7

Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. III) 1331 *et seq.* 4, 5

43 C.F.R. 3108.2-1 6

Page

Miscellaneous:

H.R. Rep. No. 91-1005, 91st Cong., 2d Sess. (1970) 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1402

THOMAS JAMES O'GRADY, ET AL., PETITIONERS

v.

JAMES G. WATT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 2) is unreported. The memorandum opinion and order of the district court (Pet. App. 3-7) is also unreported.

JURISDICTION

The order of the court of appeals was entered on October 6, 1981 (Pet. App. 2). The petition for a writ of certiorari was filed on January 4, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 31(b) of the Mineral Lands Leasing Act, 30 U.S.C. 188(b), provides, in pertinent part, as follows:

> Any lease issued after August 21, 1935, under the provisions of section 226 of this title shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such district, then in the post office nearest such land. Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * *.

Another provision of the same statute, 30 U.S.C. 188(c), provides, in pertinent part, as follows:

> Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is

shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease * * *.

STATEMENT

1. The Mineral Lands Leasing Act (MLLA), 30 U.S.C. (& Supp. III) 181 *et seq.*, requires that the lessee of a federal oil and gas lease must pay an annual rental fee on or before the anniversary date of the lease. If the lessee fails to make his annual rental payment, the lease is automatically terminated under the statute. 30 U.S.C. 188(b). Notwithstanding this provision for automatic termination, the Secretary of the Interior has the discretionary authority to reinstate a lease provided two mandatory preconditions are met. These are that the rental fee was paid within twenty days of the anniversary date, and the Secretary is satisfied that failure to pay the fee on or before the anniversary date of the lease was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. 188(c). If either of these preconditions is not satisfied, the Secretary has no discretion to reinstate the leases.

2. In their complaint in the United States District Court for the District of Columbia, petitioners sought reinstatement of two leases which had terminated automatically by operation of law for failure to pay the annual rental fees thereon either on the anniversary dates of the respective leases or within the 20-day grace period.[1] Petitioners also

---

[1]The first was Lease No. CA-2789 which was issued to Valentine Michael O'Grady by the California State Office of the Department of the Interior's Bureau of Land Management (BLM) on April 28, 1975, effective May 1, 1975. The annual rental payment on that lease was due on or before May 1 of each year, the anniversary date of the lease. Mr. O'Grady died on September 19, 1978. The annual rental fee on the lease for 1979 was due no later than May 1, 1979. Payment of the fee was not received by the BLM until July 3, 1979, 63 days after it was required to

requested, *inter alia*, a declaratory judgment that 30 U.S.C. 188(c) is vague, unconstitutional, null and void because it illegally differentiates and discriminates against oil leases in the continental United States as opposed to offshore drilling leases on the outer continental shelf.

The government filed a motion to dismiss which was granted on March 31, 1981. The district court concluded that the Secretary of the Interior had no authority to reinstate petitioners' leases since the annual rental payments thereon were more than twenty days late. The district court also determined there was no substance to petitioners' claim that they were discriminated against because of the different lease termination policies found in the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. III) 1331 *et seq*. That statute, the court noted, was not at issue in the case.

---

be paid under the MLLA. On July 20, 1979, the BLM issued a notice of termination for Lease No. CA-2789. The Interior Board of Land Appeals (IBLA) affirmed the BLM's termination of the lease on April 21, 1980. 47 I.B.L.A. 83.

The second lease for which petitioners sought reinstatement was Lease No. A-2789, allegedly issued by the Arizona State Office of the BLM in 1976. The Department of the Interior submitted evidence before the district court which indicated no such lease existed. It did, however, determine that a Lease No. A-8033 had been issued to Mr. O'Grady on May 1, 1974. That lease terminated by operation of law on May 1, 1979, for the lessee's failure to pay timely the annual rental fee. Petitioners never appealed the agency's decision to terminate Lease No. A-8033 either to the Arizona State Office of the BLM or to any other component of the Department of the Interior. Therefore, petitioners failed to exhaust their administrative remedies with regard to Lease No. A-8033. In any event, even if they had appealed the decision to terminate the lease at the administrative level, petitioners would not have prevailed in obtaining reinstatement of the lease since the annual rental payment was not paid within the required 20-day time period.

3. On petitioners' appeal the court of appeals summarily affirmed for the reasons set forth in the district court's opinion.

ARGUMENT

The decisions below are correct and do not conflict with any decision of this Court or of any other court. Review by this Court is not warranted.

1. Petitioners are apparently reasserting (Pet. 2-3) the claim that they suffered a violation of their Fourteenth Amendment rights to equal protection and due process because of differences between the procedures at issue here (30 U.S.C. 188) and those applicable to leases granted under the Outer Continental Shelf Lands Act (43 U.S.C. (& Supp. III) 1331 *et seq.*).

These contentions are frivolous. As the district court noted with regard to petitioners' equal protection claim (Pet. App. 6):

> The two regulatory provisions cited [in petitioners' complaint; *i.e.*, 43 C.F.R. 3383.5, 3385a.4] deal with suspensions of operations or production, which is not the case here. As to any differences in discretionary authority, plaintiffs have not shown what those differences are, and they have not shown how they were discriminated against.

Moreover, the leases in question were terminated in exactly the manner (as discussed below) provided by Congress in 30 U.S.C. 188. Thus, petitioners were not denied due process.

2. Petitioners' other complaint is that in cancelling the leases "the Secretary of the Interior overstepped his rule making authority in implementing a Congressional mandate * * *" and that this cancellation was arbitrary and capricious (Pet. 3-5).

The fact is, however, that 30 U.S.C. 188(c) and its legislative history make it clear that the Secretary has no discretion whatsoever to reinstate a lease terminated automatically under 30 U.S.C. 188(b) unless (1) the full rental payment is made within 20 days of the due date, and (2) the lessee establishes that the failure to make timely payment "was either justifiable or not due to a lack of reasonable diligence * * *." See also 43 C.F.R. 3108.2-1. As the district court held (Pet. App. 5-6):

> It is evident that the language in the statute is in the conjuctive [*sic*]. Defendants had no authority to reinstate the lease since the payment was more than twenty days late. Plaintiffs contend that 43 C.F.R. § 3108.2-1(c)(4) gave the Secretary discretion to reinstate. The only possible reading of that regulation, however, is that the Secretary had such discretion *if* payment was made within twenty days of the due date. Congress recognized that the twenty-day limitation would cause hardship, but nevertheless enacted it. H.R. Rep. No. 91-2005 [*sic*], 91st Cong., 2d Sess., *reprinted in* [1970] *U.S. Code Cong. & Ad. News*, 3002, 3005. This Court cannot repeal the limitation. Defendants' actions taken pursuant to the Act were not arbitrary or capricious, and plaintiffs have cited no authority which would justify a finding that these statutorily-mandated actions constituted a deprivation of either due process or equal protection.[2]

---

[2]In relevant part, the cited report (H.R. Rep. No. 91-1005, 91st Cong., 2d Sess. 4-5 (1970)) states:

> The committee wishes to emphasize that reinstatement of an oil and gas lease under the provisions of section 2, where the error, although inadvertent, is entirely the responsibility of the lessee, is not automatic but requires a petition by the lessee. A reinstatement may be made by the Secretary only after he is fully satisfied that the mistake was justifiable or not due to lack of reasonable

Indeed, the two cases cited by petitioners directly support the result below. *Santor* v. *Morton*, 383 F. Supp. 1265 (D. Wyo. 1974), involved a situation where the annual rental payment on a lease was made two weeks after the due date. Because Santor's payment was made within the 20-day grace period, he was eligible for reinstatement at the Secretary's discretion pursuant to Section 188(c) of the MLLA. The district court in *Santor* nevertheless determined that the IBLA decision to terminate the lease was neither an abuse of discretion nor arbitrary and capricious, despite the lessee's assertion that late payment was due to confusion in his business affairs. So, also, in *Ram Petroleums, Inc.* v. *Andrus*, 478 F. Supp. 1165 (D. Nev. 1979), the late payments were made within the 20-day grace period. It is true that the district court held the Secretary's refusal to reinstate the leases there to be arbitrary and capricious, but the court of appeals subsequently reversed. *Ram Petroleums, Inc.* v. *Andrus*, 658 F. 2d 1349 (9th Cir. 1981). Accord, *Ramoco, Inc.* v. *Andrus*, 649 F. 2d 814 (10th Cir.), cert. denied, No. 81-381 (Nov. 9, 1981).

---

diligence on the part of the lessee * * *. It should also be emphasized that reinstatement by the Secretary is limited to those situations where the full amount of the rental due, including any back rental, is paid or tendered within 20 days of the due date * * *. It is recognized that this 20-day limitation on reinstatements means that a small percentage of terminated leases, otherwise deserving, may not be reinstated under this legislation. However, in balancing the advantage of a more liberal relief provision against the committee's desire to reduce the incentive for "intentional" mistakes, the latter course was chosen. In the event truly deserving cases arise that cannot meet the 20-day provision recourse to private relief legislation may be necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

KATHRYN A. OBERLY
ARTHUR E. GOWRAN
Attorneys

FEBRUARY 1982

DOJ-1982-02